

August 12, 2022

Ms. Amy DeBisschop
Director of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW, Room S-3502
Washington, DC 20210

Reference: RIN 1235-AA42

Submitted via the Federal eRulemaking Portal: <https://www.regulations.gov>

Dear Ms. DeBisschop:

The Nakupuna Companies appreciate the opportunity to provide comments in response to the U.S. Department of Labor Wage and Hour Division's Proposed Rule published on July 15, 2022, RIN 1235-AA42, to implement Executive Order 14055, Nondisplacement of Qualified Workers Under Service Contracts.

These comments are a consolidation of feedback from all government contracting subsidiaries of the Nakupuna Foundation, a Native Hawaiian Organization (NHO), including Na Alii Consulting & Sales, LLC, Nakupuna Solutions, LLC, Nakupuna Consulting, LLC, and Nakupuna Services, LLC. We appreciate your willingness to solicit and consider feedback from relevant stakeholders, including the NHO and small business community.

Please see below for a summary of the proposed rule and our comments/position.

1. **§ 9.4(a)(2) Application to subcontracts:** Under the proposed rule, if a prime contract meets or exceeds the simplified acquisition threshold (SAT), then each subcontract for services under that prime contract will also be subject to the requirements of this part, even if the value of an individual subcontract is under the SAT.

Comments/Position: We support providing an exclusion for subcontracts below the SAT. Executive Order 14055 excludes "contracts under the simplified acquisition threshold," and further defines "contract" as any contract or subcontract. We do not believe there are unintended consequences for continuing the exception for subcontracts under the SAT. Rather, not extending the exception to subcontracts could result in negative consequences such as limiting the number of contractors, notably small businesses, that are willing to perform on subcontracts subject to this rule as the cost of compliance will likely outweigh the value of the subcontract.

2. **§ 9.11(c) Locality of Contract Performance:** Agencies must now complete a locality analysis to determine whether performance of the new contract in the same location would promote efficiency. If the agency's analysis leads it to not require or prefer the work be

performed in the same location, the agency's senior procurement executive must make the determination in writing. Additionally, the agency must ensure the incumbent contractor notifies affected workers within five (5) business days of the issuance of the solicitation.

Comments/Position: While we understand that this provision is included in Executive Order 14055, we are concerned that requiring a locality analysis is burdensome for agencies and any subsequent final decision will severely constrain the government if labor market conditions change rapidly throughout the solicitation, award, and hiring/staffing process. In addition, the subsequent notification of affected workers and their collective bargaining representatives is burdensome for both agencies and contractors. We support limiting coverage only to contracts for similar services at the same location, specifically the same Federal facility.

3. **§ 9.12(c)(3) Unsuitable Performance:** Under the proposed rule, a successor contractor or subcontractor would not be required to offer employment to any employee on the predecessor contract if the successor contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employee's past performance, that there would be just cause to discharge the employee if employed by the successor contractor or any subcontractors. Reliable evidence must be provided by a knowledgeable source, such as the predecessor contractor, the local supervisor, the employee, or the contracting agency.

Comments/Position: It would be incredibly difficult for successor contractors to obtain the level of evidence requested in the proposed rule, which may result in retaining employees with unsatisfactory performance. Moreover, specifically sharing details about the performance of an existing or previous employee would open up an employer to a wide range of legal liabilities. The final rule should clarify the definition of reliable evidence, provide specific examples, and establish methods for the successor contractor to obtain such evidence from the predecessor contractor or the contracting agency.

4. **§ 9.12(d)(2) Changes in Staffing Patterns:** When the successor contractor makes changes to the contract's staffing pattern, contractors are now required to structure their staff to offer employment to the greatest number of employees in positions equivalent to the positions that they held under the previous contract. The rule would "require the successor contractor to examine the qualifications of each employee in order to offer the greatest possible number of predecessor contract employees positions equivalent to those they held under the predecessor contract, thereby minimizing displacement."

Comments/Position: We oppose this proposed rule. Creating greater restrictions on restructuring staffing, in favor of maximizing the retention of current position, severely constrains successor contractors from providing an alternative solution/service that would be more effective for the Federal government. Maximizing the number of personnel who transfer from the predecessor contractor to the successor contractor also means a much lower cost-saving potential for the government. If the government wishes to minimize potential reduction of contractor positions or to dictate how a service shall be provided, the procuring

contracting officer should be required to dictate the specific SCA labor categories and number of hours to be bid, a process today that is all but non-existent.

5. **§ 9.5 Exceptions Authorized by Agencies:** To be granted an exception from these Executive Order 14055 requirements, a senior procurement executive within the agency must provide a specific written explanation of why at least one of the particular circumstances enumerated in the order exists with respect to that contract that would warrant exception from the requirements of the order. It also requires agencies to publish descriptions of each exception on a centralized public website and report exceptions to OMB on a quarterly basis.

Comments/Position: We have concerns that the exception process under the proposed § 9.5 is too arduous for contracting agencies, which may result in agencies not requesting exceptions that would have been in the best interest of the Federal government. The head of a contracting department or agency should have the authority to exempt contracts from the requirements of the order if justified.

6. **Incoming Contractor's Workforce:** This provision is not included in Executive Order 14055. However, under Section 5(b) of Executive Order 13495, successor contractors were allowed to employ their own employees, over those of the predecessor contractors, if those employees had worked for successor contractor for at least three (3) months and would otherwise be subject to discharge.

Comments/Position: We support including a clause in the final rule, like the provision in Executive Order 13495, which would allow successor contractors to retain their own employees who would otherwise face layoffs. Displacing employees of successor contractors is contradictory to the intent of the rule, which seeks to avoid displacement and reduce disruption.

Thank you for the opportunity to provide comments regarding this Proposed Rule (RIN3245-AG94) and for considering our position as the rule is being finalized.

Respectfully submitted,



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